

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL SAMUEL WATKINS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2008

No. 278953

Wayne Circuit Court

LC No. 07-003892-01

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), possession of less than 25 grams of fentanyl, MCL 333.7403(2)(a)(v), and possession a controlled substance analogue, MCL 333.7403(2)(b)(ii). Pursuant to MCL 769.12, he was sentenced as a fourth habitual offender to concurrent prison terms of 51 months to 20 years for the possession of cocaine conviction, one to four years for the possession of fentanyl conviction, and one to two years for the possession of an analogue conviction. He appeals as of right and we affirm. This appeal has been decided without oral argument. MCR 7.214(E).

In the early morning hours, police officers patrolling the Jeffries projects for narcotic activity observed defendant and Ricki Manning standing near the steps on the courtyard side of a unit. The officers left their patrol car to speak with them. After the officers illuminated the area, identified themselves, and approached, the men ran into a unit and then left the building through another door. The officers pursued them. Three officers testified that they observed defendant drop or toss a bag containing the substances in question to the ground. The police eventually apprehended defendant and Manning.

Defense witness Tyrice Young, who went to high school with defendant and Manning, and who played basketball at the projects with defendant, testified that from the bathroom window in his apartment, he saw defendant and two other people running out of a unit, pursued by the police. The area was dimly lit. He did not see anyone throw anything. He did not see the police pick up anything in the area, but claimed that the officers searched the house and were there for approximately two hours.

The trial court found that the officers were credible, but that only part of Young's testimony was credible. The court found that defendant had possessed the discarded contraband,

inasmuch as all of the officers testified that they saw him discard it, but was not convinced that he was guilty of delivery.

Defendant first argues that the trial court abused its discretion by denying his motion for a new trial. This Court reviews for an abuse of discretion a trial court's decision denying a motion for a new trial, and reviews for clear error the court's findings of fact. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant moved for a new trial pursuant to MCR 6.431(B), which states that a court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." Defendant's motion sought a new trial on the basis of favorable test results from defendant's polygraph examination. Polygraph test results may be considered in the context of a motion for a new trial "to buttress the credibility of new witnesses, the evidentiary value of whose testimony satisfies traditionally strict criteria for ordering a new trial." *People v Barbara*, 400 Mich 352, 359; 255 NW2d 171 (1977). But when, as here, the only evidence proffered in support of the motion are the results of the polygraph examination, which are inadmissible at trial, there is not a sufficient basis for granting a new trial. *Id.* at 412 n 45.

Defendant also sought a new trial on the ground that the police allegedly "suppressed" physical evidence—specifically, fingerprints from the bag that contained the drugs and a videotape of the incident. There is no factual support for defendant's contentions in this regard. At most, the record suggests that the police did not make an effort to handle the bag in a manner to preserve fingerprints by, for example, not using gloves. There is no evidence that the police suppressed a videotape of the incident; the record does not indicate that any video was recorded. Even if defendant had established a failure to preserve evidentiary material that may have been exculpatory, that failure does not constitute a denial of due process unless bad faith on the part of the police is shown. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Defendant has made no showing of bad faith.

For these reasons, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant also argues that the trial court abused its discretion at trial when it refused to consider evidence that Manning was convicted of selling a large quantity of drugs in the same neighborhood a month after the incident at issue in this case. According to defendant, this evidence made it more probable that Manning—and not defendant—was the person who threw the bag containing the drugs in this incident.

Our review of this claim is impeded by the fact that discussion of the evidence and any ruling by the trial court occurred during an unrecorded sidebar conference. According to defense counsel's representations at sentencing, however, the side bar offer of proof was that approximately 3 ½ weeks after defendant's arrest, Manning was arrested approximately a block away from the place of the instant offenses, in possession of more than 280 grams of controlled substances that were packaged similarly to the drugs recovered in this case. The trial court determined that this evidence was not relevant "because of timeframe and other issues."

Even if this evidence was relevant, any error in excluding it was harmless because it does affirmatively appear more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Three police officers who were in a position to see defendant and whose attention was focused on him unequivocally identified defendant as the person who dropped the bag. Evidence of Manning's illicit activities weeks later did not contradict the officers' identification testimony. Thus, it is not more probable than not that the outcome would have been different had the trial court admitted the evidence of Manning's possession of similar drugs several weeks later.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter